

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

with
affidavit

77-2030
77-2031

To be argued by
CARL T. SOLBERG

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket Nos. 77-2030, 2031

LYMAN T. SHEPARD,
Petitioner-Appellant,

—v.—

LARRY TAYLOR, Warden, Metropolitan Correctional
Center, and MAURICE SICLER, Chairman, United
States Parole Commission,
Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENTS-APPELLEES

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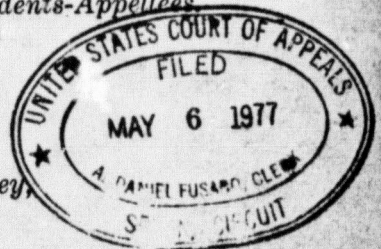


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LARRY TAYLOR, Warden, Metropolitan Correctional Center, and MAURICE SIGLER, Chairman, United States Parole Commission,

Respondents-Appellees.

BRIEF FOR RESPONDENTS-APPELLEES

Preliminary Statement

The petitioner-appellant, Lyman T. Shepard, appeals from two judgments entered in the United States District Court for the Southern District of New York: the first on January 24, 1977, pursuant to a Memorandum of the Honorable Charles H. Tenney, United States District Judge; and the second on February 25, 1977, pursuant to a Memorandum and Order of the Honorable Richard Owen, denying petitions for writs of habeas corpus.

Issues Presented

1. Did the District Court err in denying habeas corpus relief on the grounds that the Parole Commission is authorized to apply parole guidelines to petitioner, sentenced under the Youth Corrections Act?

2. Did the District Court err in denying habeas corpus relief on the grounds that the Parole Commission's refusal to issue requested subpoenas was a proper exercise of discretion?
3. Is petitioner's claim concerning disclosure of his parole file prior to parole revocation hearing mooted by Parole Commission's decision to grant limited remand?

Prior Proceedings

On January 7, 1977, petitioner obtained an order directing the respondents to show cause why a writ of habeas corpus should not be granted on the grounds that the Parole Commission (hereinafter "Commission") had declined to issue subpoenas on petitioner's behalf in connection with his parole revocation hearing. *Shepard v. Taylor*, 77 Civ. 83 (CHT). The petition and the accompanying bail application were denied by Judge Tenney in a Memorandum dated January 24, 1977. (App. § C*). A motion for bail was denied by this Court on January 25, 1977.

On January 27, 1977, petitioner obtained a second order directing the respondents to show cause why a writ of habeas corpus should not be granted on the ground that application by the Commission of its guidelines to petitioner violated the Youth Corrections Act,

* "App." refers to Appendix to Appellant's Brief; "Comm. App." refers to the Appendix to Appellees' Brief. Although Mr. Shepard's Appendix consists almost entirely of material not part of the records below and therefore improperly before this Court, the Government, to respond effectively to these documents and to the new legal and factual issues raised on appeal, will cite to Mr. Shepard's Appendix and to its own Appendix, filed pursuant to its motion dated May 2, 1977.

18 U.S.C. §§ 5005 *et seq.*, under which he was originally sentenced. In connection with this petition, a bail application was denied in the District Court's emergency motion part (Pierce, J.) on January 27, 1977 and on appeal by this Court on January 28, 1977. The petition for the writ was denied, together with the accompanying bail application, by Judge Owen in a Memorandum and Order dated February 25, 1977. (App. § D).

Petitioner filed a Notice of Appeal from the denial of the first petition on January 25, 1977 and from the denial of the second petition on March 1, 1977. The two cases were consolidated on appeal by order of this Court dated March 15, 1977.

Statement of Facts

On July 7, 1972, pursuant to 18 U.S.C. §§ 5010(b) and 5017(c), petitioner was sentenced in the United States District Court for the Western District of Texas to a six-year term of imprisonment as a youthful offender for transporting a stolen car in interstate commerce, in violation of 18 U.S.C. § 2312. (App. § O). Under the terms of this sentence, petitioner was to be released conditionally, on parole, on or before 4 years from the date of his conviction, and unconditionally on or before 6 years from conviction. 18 U.S.C. § 5010(b). On April 18, 1974, he was released on parole in Florida, and directed to remain in the Middle District of Florida.

Some six months later, petitioner violated his parole by leaving Florida and travelling to New York, where, on October 18, 1974, equipped with a gun and some 60 rounds of ammunition, he attempted to rob a fast-food restaurant in New York City. He was arrested in the act by New York City police detectives, and in grappling with them, he fired the gun. (App. § O; Comm. App. at 16).

On December 17, 1974 petitioner was sentenced in the Supreme Court of the State of New York to a four-year term of imprisonment for the attempted robbery (App. § E).

Petitioner served approximately two of his four-year State term at New York State's Clinton Correctional Facility, Dannemora, New York. During this time he participated in a college program at Clinton Community College, where he compiled a 4.0 average. (App. § J). He worked as a clerk in the prison, and was released on parole on December 15, 1976. (App. §§ G, O).

Upon petitioner's release from State prison, he was taken into federal custody by the United States Marshal on December 15, 1976, pursuant to a detainer lodged by the Parole Commission. (App. § O). He was detained briefly in the Schenectady County Jail and was delivered to the Metropolitan Correctional Center in New York City on or about December 30, 1976. (App. § O).

In the meantime, the Commission had advised petitioner's counsel (Mr. Johnson) by letter dated December 14, 1976 that a parole revocation hearing would be held on January 11, 1977 in New York City. (App. § M). Ordinarily, the hearing would have been held in the Middle District of Florida, but the New York City situs was chosen for the convenience of petitioner and his counsel, who were conducting other litigation for Mr. Shepard in the Second Circuit. (App. § E).

On January 5, 1977, Mr. Johnson notified the Commission's Regional Counsel by telephone that petitioner wanted subpoenas issued for records and personnel from the Clinton Correctional Facility. Mr. Johnson forwarded a letter of request to the Regional Commissioner on that same day. (App. § K). The letter was

received in the Commissioner's office on January 6, 1977. By letter dated January 10, 1977, Mr. Johnson was informed that his request for subpoenas was denied, as the Regional Commissioner determined, based upon several factors stated in his response, that the records and personnel requested were not necessary for consideration of petitioner's case. (App. § M).

At the hearing on January 11, 1977 before two hearing examiners, petitioner gave testimony concerning the nature and circumstances of the crime for which he was sentenced by the New York State Court. His two sisters testified about his prior family life and his developing maturity during his state incarceration. (Comm. App. at 33-38).*

The hearing examiners considered a number of letters, including an October 14, 1976 letter from Mr. S. W. Haley, a Correctional Counselor at the Clinton Correctional Facility, which contained an assessment of petitioner's improvement during his State incarceration. (App. § G) (Comm. App. at 28).

The examiners also considered a letter from Mr. Peter Smith, a contractor, affirming that petitioner would be given a job and a place to stay upon his release, and petitioner's transcript attesting to his academic accomplishments at Clinton Community College. (Comm. App. at 21).

The examiners' recommended decision surveyed the favorable evidence regarding petitioner's record at Clin-

* Petitioner's Appendix includes a transcript of the parole revocation hearing prepared by his counsel. (App. § N). This transcript is apparently submitted in support of his contention that the Commission's method of recording hearings is inadequate. Appellant's Brief at 15 fn. Appellees' counsel undertook to verify this transcript and discovered that a far more complete transcription could be made with little difficulty. A copy of this transcript is provided in Comm. App. at 1-41.

ton, and concluded that federal parole should be revoked with a provision for reparole on March 15, 1977. (App. § O at 6) (Comm. App. at 39-41).

The examiners observed that the applicable parole guidelines indicated a minimum service of 48 months because petitioner's parole violation included armed robbery during which the gun was discharged. Nevertheless, they concluded,

The panel is constrained to go below the guidelines at this point in making its decision because it notes that there is no prior history of violence in Sheppards [*sic*] background. The gun which was used in the commission of the offense was not actually intended to be fired; it was actually discharged during the struggle when his captors were trying to subdue him. He has achieved an outstanding record while in state confinement, has a solid and viable release plan, particularly as it pertains to his schooling.

(App. § O at 6).

Since the hearing examiners' recommendation was for a term less than that recommended in the guidelines, it was reviewed by the Regional Commissioner, who modified the examiners' recommended decision and revoked petitioner's parole with a provision for review in November, 1977. The Commissioner's decision noted that the severity of petitioner's second crime placed him in a category under the guidelines indicating some 48 months to be served before re-release, but "a decision below the guidelines appears warranted because you have been continuously confined for 27 months with good adjustment. Your re-parole at this time would promote disrespect for the paroling process." (App. § P at 3).

Petitioner sought review of this decision by Regional Appeal (a form of reconsideration by the Regional Commissioner), which affirmed the decision of the Regional Commissioner on March 17, 1977. (Appellant's Brief at 25). Petitioner immediately appealed this determination to the National Appeals Board, the final arbiter of the Commission. This administrative appeal was pending when counsel for the Government learned for the first time, upon receipt of petitioner's brief herein, that petitioner now claimed that certain documents had not been disclosed by the Commission prior to the parole revocation hearing. (Appellant's Brief at 68).

The Commission, to ensure that Mr. Shepard was not and would not be prejudiced, remanded the administrative case on April 29, 1977 for a limited hearing to disclose the New York State Presentence Report which petitioner claims he did not see, and to afford petitioner an opportunity to rebut any demonstrably prejudicial material.*

* The Commission's decision, a copy of which will be furnished to the Court as soon as possible, was communicated by counsel for the Government to appellant's counsel by telephone on April 29, 1977. Counsel for the Government asked appellant's counsel to consent to a stay of this appeal on the grounds that administrative action has thus mooted any question of failure to disclose documents, and that other questions raised on this appeal may be similarly affected. For example, if petitioner demonstrates prejudice in undisclosed documents and offers contrary proof through documents or witnesses requiring subpoenas, the Commission may issue such a subpoena. Indeed, administrative action could conceivably result in a change in the Commission's decision on Mr. Shepard's parole, either by the hearing examiners, or by the National Appeals Board, which retained appellate jurisdiction to enable Mr. Shepard to bypass the normal appellate route if he wishes to appeal a new decision by the examiners or reinstate his pending appeal from the current Commission position. Counsel declined to consent to a stay.

These factual statements are supported by the affidavit of Carl T. Solberg, which will be handed up at oral argument.

ARGUMENT

POINT I

The District Court's Denial Of The Second Habeas Corpus Petition Should Be Affirmed.

A. The Parole Commission And Reorganization Act Amended The Youth Corrections Act's Parole Provisions to Require the Consideration of Offense Severity In Parole Decisions *

Petitioner contends that under the Youth Corrections Act ("the YCA"), 18 U.S.C. §§ 5005 *et seq.*, parole decisions can be made only in the context of the statute's purpose, *i.e.*, rehabilitation, and that therefore denial of his re-parole on the basis of the guidelines ** (taking into account, *inter alia*, the severity of his offense) is violative of the YCA. The 1976 amendments to the YCA occasioned by passage of the PCRA, however, require the Commission to consider factors including the seriousness of the prospective parolee's offense.

The YCA provision permitting parole, 18 U.S.C. § 5017(a), has been amended to read, "The Commission may at any time . . . release conditionally under super-

* The Parole Commission & Reorganization Act ("PCRA"), 18 U.S.C. §§ 4201 *et seq.*, became effective on May 14, 1976.

** The Commission has promulgated guidelines for use in parole decisions pursuant to the PCRA, 41 Fed. Reg. 37319 (Sept. 3, 1976), *amending* 28 C.F.R. § 2.1 *et seq.*

visor a committed youth offender in accordance with the provisions of section 4206 of this title. . . ." *

Section 4206 now reads in pertinent part as follows:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section, and *pursuant to guidelines promulgated by the Commission* pursuant to section 4203(a)(1),** such prisoner shall be released. [Emphasis added].

In *Walton v. Levi*, No. C-76-1806 WWS (N.D. Cal. Dec. 8, 1976),*** the court distinguished *Dorszynski v. United States*, 418 U.S. 424 (1974), relied on by petitioner, as ante-dating the guidelines, and, noting the PCRA's clarification of the YCA parole criteria, held that the use of parole guidelines, including consideration of offense severity, was clearly permissible. The same re-

* This provision previously read, "The Division [Youth Correction Division of The Board of Parole] may at any time after reasonable notice to the Director [of the Bureau of Prisons] release conditionally under supervision a committed youth offender. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Division".

** This provision directs the Commission to promulgate guidelines for, *inter alia*, the granting, denial, modification and revocation of parole.

*** A copy of this decision is found at Comm. App. at 42.

sult was reached in *McKay v. United States*, No. 76-1242 — Civ. — CA (S.D. Fla. Sept. 22, 1976),* where the court held that the discretion inherent in the guidelines, the different tables for adult and youth, and the lack of textual support in the YCA for petitioner's position indicated that the guidelines do not violate the YCA.**

The legislative history of the PCRA is instructive on the question of what Congress intended to accomplish by instructing the Commission to promulgate the guidelines. The intent of the Joint Conferees was to establish

an independent and regionalized United States Parole Commission, to provide fair and equitable parole procedures . . . [p]arole has the practical effect of balancing differences in sentencing policies and practices between judges and courts in a system that is as wide and diverse as the Federal Criminal justice system . . . The parole authority must also have in mind some reasonable system for judging the probability that an offender will refrain from future criminal acts. The use of guidelines . . . will sharpen this process and improve the likelihood of good decisions.

* A copy of this decision is found at Comm. App. at 45.

** Petitioner, having unsuccessfully tried to controvert these cases in the District Court below, has strengthened his assertions but not his arguments. (Appellant's Brief at 35 fn.). He states that *McKay* "accepts the now repudiated assumption that the guidelines are flexible." (*Id.* at 49). Petitioner is squarely contradicted by *Ruip v. United States*, No. 76-1505 (6th Cir. April 8, 1977) discussed at pp. 16-17, *infra*.

Petitioner's attempts to distinguish *Walton* and *McKay* (indeed, his entire YCA argument) can be reduced to his *ex post facto* argument (Appellant's Brief at 50), dealt with at pp. 15-17, *infra*.

Noting the need for "tools to accurately predict human behavior and judge human motivation," the Conferees observed that the Commission had used guidelines experimentally for some time, and

most importantly, the promulgation of guidelines to make parole less disparate and more understandable has met with such success that this legislation incorporates the system into the statute, removes doubt as to the legality of changes implemented by administrative reorganization, and makes the improvements permanent.

Joint Explanatory Statement Of The Committee Of Conference, S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 19-20 (1976).

. . . [I]t is the intent of the Conferees that the Parole Commission review and consider both the nature and circumstances of the offense and the history and characteristics of the prisoner. It is the view of the Conferees that these two items are most significant in making equitable release determinations and are a viable basis, when considered together, for making other judgments required by this section. It is the intent of the Conferees that the Parole Commission, in making each parole determination, shall recognize and make a determination as to the relative severity of the prospective parolee's offense and that in so doing shall be cognizant of the public perception of and respect for the law.

Id. at p. 25. In light of this clear Congressional mandate, the guidelines and their application to this case are hardly as unreasonable as petitioner would have the Court believe. First, the Commission is clearly authorized—

indeed *compelled*—to consider the severity of petitioner's offense in making a parole determination. Second, the decisions of the examiners and the Regional Commissioner both reflect the fact that other factors were given significant weight as well. Both decisions permit release before the time period provided in the guidelines, expressly because of petitioner's good behavior in Clinton and his solid release plans.

It is further clear that the PCRA was meant to be, and in this case has been, administered with the original YCA sentence in mind. The guidelines contains an entirely separate set of rules for youth offenders, as opposed to adults; 28 C.F.R. § 2.21(b)(2) specifically states, "The original sentence type (*i.e.*, adult, youth) shall determine the applicable guidelines for the parole violator's term."

And as has been demonstrated, the PCRA has amended the statutory provisions previously used for parole purposes under the YCA. A brief note by the Joint Conference bears witness:

Section 5005 of Title 18, United States Code, is amended to make certain parole procedures for individuals sentenced under the provisions of the Youth Corrections Act parallel with those provided under Chapter 311 of Title 18, United States Code, as amended by this Act . . . Section 5020 of Title 18, United States Code, is amended to provide that parole revocations for individuals sentenced under the provisions of the Youth Corrections Act are conducted in the same manner as prescribed for other parolees.

S. Conf. Rep. No. 94-648, *supra* at 36. Congress intended to provide "a national parole policy which seeks

to achieve both equity between individual cases and a uniform measure of justice," *Id.* at 26, for all prisoners. Even juvenile delinquents are brought under the umbrella of the PCRA, in the amended 18 U.S.C. § 5041.

Petitioner's reliance on *United States v. Cruz*, 544 F.2d 1162 (2d Cir. 1976) for a critical view of the guidelines is disingenuous. That case involved not a parole revocation situation, not an intervening crime committed on parole, but a simple challenge to the Commission's interpretation of a 2-year sentence. The Court's discovery that the combination of the YCA sentence and the guidelines left Cruz in the same parole position as if he had been sentenced as an adult prompted its remark in *dictum* regarding a possible conflict with the YCA.* The equal treatment for adult and youth suggested by Cruz' peculiar circumstances excited the Court's interest; but the guidelines treat adults and youths differently as a rule, and so the *Cruz* opinion is not controlling here.

B. Practical Considerations of Fairness And Rehabilitation Require Consideration Of Offense Severity In The Parole Decision

It must be remembered that consideration of the severity of the crime committed is a factor in determining the release dates of youthful offenders who have com-

* This court has elsewhere indicated its concern over a possible conflict between the guidelines and the YCA in *United States v. Jackson*, No. 76-1496 (2d Cir. March 2, 1977) (relied upon by petitioner). After noting this possible conflict, the Court concluded: "But we also agree that the remedy for the inequities created by the interaction between the guidelines and the act rests either in administrative reform or Congressional action." *Id.* at 2114. A copy of The *Jackson* opinion is provided at Comm. App. at 51.

mitted low severity as well as high severity crimes. If offense severity could not be considered in the parole decision, a distorted system of criminal justice would result. The Parole Commission would be forced to parole immediately many high severity offenders, such as bank robbers, who have no prior criminal records and good family and employment backgrounds, have adjusted well to prison life and thus pose very little risk of future criminality if judged without regard for the crime they committed. At the other end of the spectrum, the Commission would be required to hold to the expiration of their sentences, as poor parole risks, minor offenders who have prior records, no family, poor employment prospects and are slow to adjust to prison life. This reasoning would also require that sentencing judges place on probation all those youths convicted and sentenced under YCA who are very good risks, no matter how heinous the crimes they commit.

This approach to justice would hardly be conducive to the rehabilitation of those persons the system seeks to reform. The successful rehabilitation of an offender is to a large extent dependent on that offender's confidence in and respect for the correctional system which is treating him. Therefore, by promoting fair and consistent treatment of similarly situated offenders, the Parole Commission's consideration of offense severity in its guidelines directly promotes the effective treatment of youth offenders.

C. Application of the Parole Guidelines to a Youth Offender Does Not Violate the Ex Post Facto Clause of the Constitution

Petitioner argues that the application of the guidelines, promulgated for his criminal sentence in the Western District of Texas in 1972, to the decision of the Commission as to whether or not to parole him, represents an *ex post facto* application of law.

It is the Government's position that the guidelines do not fall within the time-tested definition of *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1789), that a law is *ex post facto* if it "makes an action done before the passing of the law, and which was innocent when done, criminal; [or] . . . changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed." On the contrary, the guidelines are not law, but flexible suggestions from which the Commission may deviate if circumstances warrant.

The application of the guidelines to Mr. Shepard does not in any way increase the punishment originally inflicted on him by the Western District of Texas, which sentenced him to a maximum term of six years.* To be sure, he was paroled as was apparently contemplated by the sentencing judge, since the sentencing provisions requires a release after four years, 18 U.S.C. § 5017(c). However, parole is a reward, conditional as every prisoner knows on good behavior and revocable upon specified violations.** Lyman Shepard committed a serious crime

* Mr. Shepard's 6-year term will end on April 9, 1978. Comm. App. at 3.

** Mr. Shepard has long been aware of the consequences of misbehavior while out of prison on a parole-type program. Comm. App. at 26.

while on parole; it is for that very good reason that his parole was revoked. His original punishment is not being increased; he is merely being required to bear more of it than he would have, had he not committed another crime while free on the trust of the Parole Commission.

The Sixth Circuit recently met this issue squarely, in *Ruip v. United States*, No. 76-1505 (6th Cir. April 8, 1977).^{*} In that case, plaintiff was sentenced to 18 years imprisonment in July of 1971, pursuant to 18 U.S.C. § 4208(a)(2), following a guilty plea to a charge of bank robbery during the course of which, a firearm was discharged. At the time of sentence, the court noted, parole decisions were made in the discretion of the members of the Parole Board, predecessor of the Commission. Plaintiff argued that the use of the guidelines in the denial of his parole on the grounds that his offense was rated as "greatest severity because shots were fired . . ." placing plaintiff in a category requiring at least ten more months of prison violated the *ex post facto* proscription of the Constitution.

Noting that parole eligibility is regarded today as an "integral part of the sentence," the court posed, and answered in the negative, the question of "whether, under the circumstances of this case, administrative guidelines on parole come within the prohibition against *ex post facto* laws," *Id.* at 7. The court observed that the parole authorities have always been invested with considerable discretion, and distinguished *Love v. Fitzharris*, 460 F.2d 382 (9th Cir. 1972), *vacated as moot*, 409 U.S. 1100 (1973), relied upon by petitioner where an agency interpretation of law was held to violate the *ex post facto* prohibition. *Ruip*, on the other hand, involved

^{*} A copy of this decision is found at Comm. App. at 57.

. . . an agency's setting up guidelines for itself to assure the uniform execution of its business. These guidelines are not law, but guideposts which assist the Parole Commission (and which assisted the Board of Parole) in exercising its discretion. Nor do these guidelines have the characteristics of law. They are not fixed and rigid, but are flexible. The Commission remains free to make parole decisions outside of these guidelines. . . .

Id. at 8. The fact that Shepard was originally sentenced as a youth offender in no way detracts from the force of this decision. The essence of the Sixth Circuit's holding is that the guidelines, when applied to a prisoner sentenced before their promulgation, do not violate the *ex post facto* prohibition.

POINT II

The Regional Commissioner's Decision Not To Issue The Subpoenas Was A Proper Exercise Of Discretion.

Petitioner claims that the Commission's decision declining to issue the requested subpoenas for his New York State institutional record and for the appearance of his State caseworker at the revocation hearing constituted a denial of due process.

The Commission's decision was a proper exercise of discretion. There was ample evidence of petitioner's institutional record before the examiners, so that the records sought to be subpoenaed would have been duplicative, and there was no indication in the record that the caseworker would not or could not provide a written statement instead of his live testimony. In fact, the record *does* contain a letter from the case-

worker attesting to petitioner's fine adjustment. (App. § G).

The Parole Commission is authorized by 28 C.F.R. § 2.51 to subpoena witnesses and evidence for use at parole revocation hearings. It is clear from the legislative history of this provision that Congress intended such power to be exercised at the Commission's discretion.

In exercising its discretion to issue a subpoena, the Commission shall take into consideration factors which include relevance of the testimony or evidence sought, and whether or not such testimony or evidence is duplicative.

S. Conf. Rep. No. 94-648, *supra* at 35.

The Parole Commission has promulgated regulations which delegate to the Regional Commissioners this authority to issue subpoenas for the appearance of witnesses upon their own motion:

. . . or upon a showing by the parolee that a witness whose testimony is necessary to the proper disposition of his case will not appear voluntarily at a local revocation hearing or provide an adequate written statement of his testimony . . .

41 Fed. Reg. 37330 (September 3, 1976) (to be codified in 28 C.F.R. § 2.51(a)(2)). This provision is clear, unambiguous, and in keeping with the statutory mandate. It does not, in any way, suggest that issuance of subpoenas is mandatory upon a motion by a parolee.

Unless the Commissioner has abused his discretion and acted in an arbitrary or capricious manner, his

decision should not be overturned by a court on review. *Caton v. Smith*, 486 F.2d 733 (7th Cir. 1973); *Carioscia v. Meisner*, 331 F. Supp. 635 (N.D. Ill. 1971). The District Court found no abuse of discretion, and this finding should not be overturned unless clearly erroneous.

In this case the Regional Commissioner was required to determine whether he should, on the motion of the parolee, subpoena records and a witness from the institution where petitioner served his State sentence. All facts considered, his decision not to do so was reasonable. The petitioner was sentenced by the State to a four-year term of imprisonment, and released on parole after serving two years of that sentence. Clearly the State Parole Board believed that petitioner was sufficiently rehabilitated to grant his early release. This inference was considered by the hearing examiners in their tentative decision of January 11, 1977. (Comm. App. at 30; App § O at 6).

Petitioner cannot argue that the Commission is required, or indeed should be required, to subpoena documents and witnesses which he unilaterally determines will help him secure the result which he so clearly desires. *Hyser v. Reed*, 318 F.2d 225, 239 (D.C. Cir.), cert. denied sub nom. *Thompson v. United States Board of Parole*, 375 U.S. 957 (1963) and *Jamison v. Chappell*, 375 U.S. 957 (1963). The danger of such a concept clearly outweighs any possible benefit which could accrue to a parolee, for it would require the issuance of subpoenas in virtually all cases and place an unnecessary burden on the Parole Commission and the subpoenaed parties.

The regulations provide that where a parolee seeks a subpoena for a witness, he must demonstrate that the witness will neither appear voluntarily nor provide an

adequate written statement of his testimony. 28 C.F.R. § 2.51(a)(2). Petitioner's sole effort to satisfy this requirement is reflected in his counsel's January 5, 1977 letter to the Regional Commissioner:

Because of the nature and complexity of his anticipated testimony, an adequate written summary cannot be prepared.

(App. § K).

This statement hardly satisfies the requirements of the regulation. The letter does not even suggest that Mr. Haley said he could not or would not provide a written statement concerning petitioner's adjustment, progress and rehabilitation.* To state simply that such an evaluation would be too complex to set forth in writing is strained at best and clearly does not comport with the meaning of the regulation, either in letter or in spirit.

Petitioner relies heavily upon *Morrissey v. Brewer*, 408 U.S. 471 (1972), to support his contention that the denial of the subpoenas was a violation of due process. This reliance is clearly misplaced. In *Morrissey*, the Court stated that a parolee is not entitled at a parole revocation hearing to the full panoply of rights due a defendant in a criminal prosecution. The Court determined that the process due a parolee in order to guarantee a fair determination in a revocation hearing "must lead to a final evaluation of any *contested* relevant facts and consideration of whether the facts as determined warrant revocation." *Id.* at 488 (emphasis supplied). The Court went on to state:

The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the

* Indeed, such a letter is in the Parole Commission's record and was carefully considered by the hearing examiners in reaching their decision. Comm. App. at 28, 33.

conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.

* * * * *

We cannot write a code of procedure; that is the responsibility of each State . . . Our task is limited to deciding the minimum requirements of due process. They include (a) written notice of the claimed reasons of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing-officer specifically finds good cause for not allowing confrontation), (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole. We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense. It is a narrow inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

Id. at 488-89. Section 2.51 clearly conforms to the due process requirement enunciated by the Court in *Morrissey*. The Court stated that a parolee should be given an opportunity to present witnesses and documentary evidence. There is no requirement under the standards established by the Court that the Commission facilitate presentation of witnesses and documents reflecting on a parolee's redeeming qualities. The Court clearly held in

Hyser v. Reed, *supra* at 239 (cited in *Morrissey* and not overruled by that decision) that an individual was not entitled to compulsory process.

Moreover, even if *Morrissey* could be read for such a proposition, the facts in the present case do not suggest that such a liberal reading is necessary to effect a fair and just result in this case. As Judge Tenney recognized, the information petitioner sought to introduce through the requested subpoenas with regard to petitioner's rehabilitation was largely before the hearing examiners and was relied upon by them in their determination that petitioner should be incarcerated for a period below that suggested by the guidelines. (App. § C at 6). While counsel for petitioner argues that Judge Tenney's decision was made without reviewing the records sought to be subpoenaed (Appellant's Brief at 58), it is difficult to accept counsel's assertion that such failure constituted error. The hearing examiners took into account both the documentary evidence concerning petitioner's performance and rehabilitation during his State incarceration, and petitioner's own statements. Since they found his record and adjustment outstanding, no further evidence was required to give support to such a finding in petitioner's favor. Judge Tenney's determination that further evidence would be duplicative required no review of the State institution files, in view of the examiners' favorable decision.

Petitioner argues that the Regional Commissioner's modification of the hearing examiners' decision and his finding that petitioner's record was "good" rather than "outstanding" indicate that Mr. Shepard's parole file contains insufficient documentation of his institutional adjustment. (Appellant's Brief at 67). However, the Regional Commissioner did not disavow the hearing examiner's findings concerning petitioner's adjustment

in prison, but approved a decision below the parole guidelines specifically on that basis. (App. § P). The Regional Commissioner's decision to continue petitioner in custody with review in November, 1977 was made primarily on the basis of the severity of petitioner's parole violation; immediate reparole would undermine respect for the parole system. (App. § P).

It is a fundamental axiom that in considering whether an agency has complied with its regulation, deference should be given to the agency's interpretation of the regulation, unless the agency's interpretation is totally inconsistent with the regulation. *Thorpe v. Housing Authority*, 393 U.S. 268, 276 (1968); *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945); accord, *Udall v. Tallman*, 380 U.S. 1 (1965). Indeed, unless the agency's determination is clearly inconsistent with the regulation, it should be accorded controlling weight. *Thorpe, supra*, 393 U.S. at 276. This is particularly true where, as in the present case, the regulation in question is relatively new and involves contemporaneous construction by the agency required to administer it. *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO*, 367 U.S. 396, 408 (1961).

POINT III

The New Issue Concerning Disclosure Of Appellant's Parole File Before The Revocation Hearing Is Mooted By The Commission's Decision To Remand For Limited Hearing On This Issue.

Petitioner argues that the Commission failed to disclose the entire contents of his parole file prior to his parole revocation hearing in January 11, 1977. This argument should not be considered by this Court because it raises legal issues not raised before the District Courts and is dependent upon factual matters not part of the

District Courts' records. Therefore, this Court cannot accurately and fairly review the decisions of those tribunals on this issue. *Cf.*, *Terkildsen v. Waters*, 481 F.2d 201, 204-5 (2d Cir. 1973); *List v. Fashion Park, Inc.*, 340 F.2d 457, 461 (2d Cir.), *cert. denied*, 382 U.S. 811, *re-hearing denied*, 382 U.S. 933 (1965).

The Government learned of this contention for the first time upon receipt of appellant's brief herein. Counsel for the Government immediately advised the Commission, and an investigation was conducted to determine: (1) what documents were before the hearing examiners and the Regional Commissioner, and (2) what documents were disclosed to appellant. The investigation revealed that it is impossible to tell from Mr. Shepard's files at the Metropolitan Correctional Center and at the Commission's offices which documents the examiners did or did not consider, whether the New York State Presentence Report was disclosed to petitioner, and whether the "separate packet" referred to in petitioner's Appendix § X was duplicative of previously disclosed materials. These matters could be settled only by a factual hearing, or by prophylactic disclosure with an opportunity for petitioner to rebut any prejudicial material not previously disclosed.. To prevent any possible prejudice to petitioner, the Commission, on April 29, 1977, remanded the administrative case to the hearing level for the express limited purpose of disclosing the New York State Presentence Report to petitioner, with the opportunity for petitioner to rebut any prejudicial material. This hearing is scheduled to take place in mid-May, 1977.*

* The Commission had before it Mr. Shepard's administrative appeal to the National Appeals Board, filed March 14, 1977 and not mentioned in petitioner's reference to the pursuit of his administrative remedy, Appellant's Brief at 25. In both cases below, the Government argued that petitioner had not exhausted his administrative remedy, but neither court chose to dispose of the case on that issue.

The Government contends that this decision moots petitioner's claim that documents were not disclosed, and provides the best method for disposition of that claim. The factual determinations necessary to decide what documents were and were not disclosed would require a remand to the District Court for a hearing, if not outright dismissal of this point on appeal, since it is not properly raised here. Thus an administrative remand, which will prevent any possible error at the source, will not cost petitioner additional time. Furthermore, if no change in Mr. Shepard's parole status results from this rehearing, his administrative review will be immediately reinstated at the National Appeals Board.

Petitioner will doubtless argue that the Commission had previous opportunities to disclose these documents. On the contrary, Mr. Shepard's counsel made two requests for documents: the first, dated November 12, 1976, resulted in disclosure by letter of December 2, 1976 (App. § F) of all documents then in the files of the Commission save specified excisions and withheld documents, for which appropriate reasons were given at the time.*

Although at the parole revocation hearing Mr. Shepard's counsel renewed its oft-repeated request for subpoenas, and also requested that a court reporter and a second attorney (for petitioner) be present, no renewal was made of the request for documents. The corrected

* For example, a psychiatric evaluation the disclosure of which might disrupt institutional programs and cause harm to individual inmates, and the Presentence Report of the United States District Court for the Western District of Texas, to which Court the Commission referred counsel for a copy. Petitioner appealed the Commission's decision to delete material to the Deputy Attorney General (App. § G) and was subsequently informed by telephone on January 5, 1977 of the deleted psychiatric material. (Appellant's Brief at 8).

transcript of the hearing reveals that some documents were discussed during the hearing—and in every case shown to petitioner's counsel—but not all are identifiable from the transcript.*

No further request was made for documents until February 4, 1977.**

In response the Commission forwarded by letter dated February 24, 1977 all materials received since the previous disclosure date, December 2, 1976, deleting only litigation discussions and the New York State Presentence Report, for a copy of which the Commission referred counsel to the New York State authorities.***

It is clear from the foregoing that the Commission has responded in good faith and timely fashion to petitioner's two requests for disclosure.

Should this Court, however, elect to reach this issue and determine what documents were not disclosed and whether any prejudice resulted, the Government is prepared to hand up at oral argument the entire contents of

* Comm. App. at 8, 33.

** The total lack of mention of this letter in petitioner's papers may give the very misleading impression that the Commission suddenly and belatedly disclosed previously requested documents. To correct this impression, the Government refers to petitioner's counsel's letter (Comm. App. at 71), which requests "... all other papers . . . that have been placed in Mr. Shepard's parole file since my previous request for disclosure of the file made in early December, 1976." It is evident that petitioner's counsel had made no intervening requests. The Commission, a large and overburdened agency, can hardly be expected to forward to prisoners' counsels all documents as they come into the Commission's possession.

*** A copy of this letter, also omitted from petitioner's Appendix, is found at Comm. App. at 72.

the Commission's file on Mr. Shepard which includes all documents that *could* have been before the hearing examiners and the Regional Commissioner. The Court would then have the opportunity to determine for itself that there has been no prejudice to petitioner.

In light of the favorable decision Mr. Shepard received from the hearing examiners, and even in the less favorable view taken by the Regional Commissioner, it is clear that at each level the Commission has considered petitioner's State institutional record to be a good one. It was only on the basis of the fact that his intervening crime was a serious one—armed robbery of a crowded restaurant,* with a shot fired—that the Commission determined to revoke parole, lest the parole process lose respect in the eyes of prospective violators.

CONCLUSION

Under the 1976 Parole Commission and Reorganization Act, the Commission is clearly entitled to apply its parole guidelines to a parole violator initially sentenced under the Youth Corrections Act. Since these guidelines are flexible and do not have the force of law, they do not violate the *ex post facto* proscription of the Constitution. Therefore the decision of the District Court (Owen, J.) denying a writ of habeas corpus should be affirmed.

In view of the duplicative nature of the documents sought to be subpoenaed by petitioner, and petitioner's failure to show that a written statement by the individual sought to be subpoenaed would not have sufficed, the Commission's refusal to issue such subpoenas was

* Comm. App. at 14.

not an abuse of discretion, and the decision of the District Court (Tenney, J.) denying a writ of habeas corpus should be affirmed.

Petitioner asserts for the first time, on appeal, that he was denied disclosure of certain documents in his parole file prior to his parole revocation hearing. This claim raises factual issues not capable of resolution at the appellate level. In view of the Commission's action in remanding petitioner's administrative appeal for a limited proceeding to cure any error, without stating that there was error, the efficacy of such a solution and the lack of prejudice to petitioner thereby, this issue should not be addressed by this Court.

Dated: New York, New York
May 2, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
County of New York) ES

Carl T. Solberg being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies
5th day of May 19 77 he served ~~a~~ copy of the
within Brief for Respondents-Appellees

by placing the same in a properly postpaid franked envelope addressed:

Phylis Skloot Bamberger
Federal Defender Services Unit
509 U. S. Courthouse
Foley Square
New York, New York 10007

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

5th day of May, 1977

PATRICK H. BARTH
NOTARY PUBLIC, STATE OF NEW YORK
 No. 24-4526237
 Qualified in Kings County
 Certificate filed in New York County
 Commission Expires March 30, 1978

Carl F. Soderberg